EDWIN CHEN

v.

PEARSON

COURT OF APPEAL, SINGAPORE
YONG PUNG HOW CJ
LAI KEW CHAI J
S RAJENDRAN J
[ORIGINATING MOTION NO. 19 OF 1991]
30 JULY 1991

FAMILY LAW: *Deed of reconciliation - Whether made freely - Decree nisi - Decree absolute - Ancillary matters - Women's Charter, s. 90.*

CIVIL PROCEDURE: *Filing of notice of appeal - Out of time - Mistake of legal Adviser - Whether notice of appeal is a "pleading" - Rules of the Supreme Court [Sing], O. 3 r. 3, O. 57 rr. 4, 17 - Supreme Court of Judicature Act [Sing], s. 29.*

By an order dated 26 November 1990 issued by the Judicial Commissioner, custody of the children of the divorced parties were given to the husband, and reasonable access was given to the wife. This order became the subject of an intended appeal on the basis that a sum of $160,000 as agreed by the parties under a deed had not been included in the order. Under O. 57 r. 4 of the Rules of Supreme Court 1970 (RSC) the notice of appeal should have been filed and served on or before 26 December 1990. Due to the wife's own solicitor's mistake the notice of appeal was rejected by the Court registry on the basis that it was filed out of time.

On 29 January 1991, the wife's solicitors filed an originating motion for extension of time to appeal against the Judicial Commissioner's order of 26 November 1990. On 25 February 1991, the motion was dismissed on the ground that the application should be made to the Court of Appeal. A fresh originating motion was filed and on 5 April 1991 Chao J (sitting as a single Judge of the Court of Appeal) ruled that the motion be adjourned for hearing before the full bench of the Court of Appeal.

The issue before the Court of Appeal is whether the Court has jurisdiction and the power to grant the extension of time and if so, whether it ought to be granted.

Held:

[1] It is not necessary to consider the submission of s. 29 of the Supreme Court of Judicature Act (the Act) as the proceedings would be an exercise of "original" jurisdiction only because of the use of the term "originating motion". The proceedings are not "original" in any other sense. Litigation between the parties has been going on for more than 5 years, and this application can be considered as an interlocutory motion in the divorce petition. No prejudice will be suffered by the husband if the Court of Appeal treated this as an interlocutory motion.

[2] Extension of time is a question of discretion and in determining whether extension should be granted the facts to be considered are the length of delay; the reasons for the delay; the chances of the appeal succeeding if time for appealing is extended; and the degree of prejudice to the would-be respondent if the appeal is granted.

[3] In this case, the reasons for the delay of 12 days and the likelihood of success are facts which weigh heavily. The delay was due to the solicitors' error of misconstruing "notice of appeal" as being a "pleading". However the misunderstanding in this case is not one which, to anyone reading the rule without having the authorities in mind, might have arisen.

[4] The sum of $160,000 arose under the aborted deed of reconciliation, which was repudiated by the wife when she appeared before Chua J; the wife was therefore now relying only on that portion which was advantageous to her.

[5] Although admittedly there was a *bona fide* mistake as to the computation of time, the appeal for extension should be on grounds sufficient to persuade the Court to show sympathy to the applicant. No such grounds were shown in the present case and accordingly the application must be dismissed.

[Application dismissed with costs.]

Cases referred to:
Banque Nationale De Paris v. Shin Hong Hang Enterprise Pte. Ltd. & Ors. [1988] 2 MLJ 519 ***(cit)***
Gatti v. Shoosmith [1931] 3 All ER 916 ***(dist)***
Hau Khee Wee & Anor. v. Chua Kian Tong & Anor. [1987] 2 MLJ 146 ***(cons)***
In Re Carroll [1931] 1 KB 104 ***(dist)***
Karno v. Spratt [1909] WN 251 ***(dist)***
Palata Investments Ltd. & Ors. v. Burt & Sinfield Ltd. & Ors. [1985] 2 All ER 517 ***(dist)***
Tan Chai Heng v. Yeo Seng Choon [1981] 1 MLJ 271 ***(cit)***

Legislation referred to:
Rules of the Supreme Court [Sing], O. 3 r. 3, O. 57 rr. 4, 17, O. 59 rr. 4(1), 14(12)
Supreme Court of Judicature Act [Sing], s. 29
Women's Charter [Sing], s. 90

For the appellant - Sim Mei Ling
For the respondent - Ho Woon Choon

JUDGMENT

Yong Pung How CJ:

This was an application to the Court of Appeal for an extension of time to appeal against a Court order on ancillary matters, due to a misreading of the Rules of the Supreme Court by the applicant's solicitors.

The parties were married in October 1965. On 29 October 1985, after being married for some 20 years, a divorce petition was filed by the wife. On 16 October 1986, a deed of reconciliation (the "deed") was entered into by the parties, and this was followed by an application by the husband by way of summons-in-chambers for the Court to approve the deed pursuant to s. 90 of the Women's Charter. At the hearing of the summons-in-chambers on 31 October 1986, the wife was absent. On the instructions of the Court, a letter was written to her by the husband's solicitors to draw her attention to the Court proceedings and on 27 November 1986, she appeared in person and tendered a written submission. As it appeared from this that she was alleging that the deed had not been entered into freely, the Court did not give its approval to the deed. Subsequently, her divorce petition was withdrawn by consent on 8 June 1989.

On 15 August 1989, a divorce petition was then filed by the husband, and on this petition a decree *nisi* was obtained and later made absolute on 18 December 1990. Before the decree was made absolute, the ancillary matters came before a Judicial Commissioner on 26 November

1990. After hearing the parties the learned Judicial Commissioner ordered that custody of the children be given to the husband with reasonable access to the wife; and he ordered that some rosewood furniture be given to the wife absolutely; but he made no order on maintenance for the wife, and no order, as to costs. This Court order, in particular the portion relating to maintenance, was the subject of an intended appeal. For this purpose, the notice of appeal would have had to be filed and served under O. 57 r. 4 within one month of the date of the Court order, that is, on or before 26 December 1990. Unfortunately for the wife, her solicitors were of the mistaken impression that O. 3 r. 3, under which the period of the Court vacation in December is excluded from the time for filing and service of any pleading, also applied to a notice of appeal. The solicitors made two attempts at filing the notice of appeal on 7 January 1991 and 9 January 1991, but each time the Court registry declined to accept it as it was out of time. On the latter date, the solicitors were instructed to see the Assistant Registrar on 16 January 1991. On that date, the Assistant Registrar ruled that a notice of appeal was not a "pleading" within O. 3 r. 3. The solicitors for the wife wrote to the solicitors for the husband for consent to an extension of time for them to file the notice of appeal, but they did not agree to this. An application was then made by the wife by way of a summons-in-chambers for an extension of time. The application was heard by Thean J on 21 January 1991 and was adjourned to 4 February 1991 to enable affidavits to be filed. On 23 January 1991, the wife's solicitors told the husband's solicitors that they were not proceeding with the application and the application was withdrawn on 4 February 1991.

On 29 January 1991 the wife then filed an originating motion no. 9 of 1991 for an extension of time to appeal against the Court order of 26 November 1990. This was heard by Chao J on 8 February 1991, when he adjourned the hearing to 12 February 1991 for further authorities to be submitted on jurisdiction. On 25 February 1991, after reserving judgment the learned Judge dismissed the motion as he had decided that the application to extend time must be made to the Court of Appeal. On 28 February 1991, a fresh originating motion no. 19 of 1991 was filed by the wife. On 5 April 1991, Chao J sitting as a single Judge of the Court of Appeal heard the application and ruled that the motion be adjourned for hearing before the full Court of Appeal.

Out of this welter of Court proceedings, three issues arose in the appeal, namely, whether the Court of Appeal has jurisdiction and the power to grant the extension of time and, if so, whether the extension of time ought to be granted.

On the first issue Counsel for the wife argued that it was implicit that the Court of Appeal has jurisdiction under s. 29 of the Supreme Court of Judicature Act and O. 57 r. 17 when an application is made after the expiration of the time for appealing. Counsel referred to *Karno v. Spratt* [1909] WN 251. As for the power to extend time, Counsel relied on Chao J's judgment in the Court below, in particular, on the following passages where Chao J, after considering O. 57 r. 17 said:

> There are two possible ways of looking at r. 17, but in my view both lead to the same result in so far as this case is concerned. First, the opening words of r. 17 "without prejudice to the power of the Court of Appeal ... to extend the time prescribed by any provision of this order," effectively imply that extending any time prescribed under O. 57 may only be done by the Court of Appeal. What follow thereafter in r. l7 are the exceptions where the Court below is permitted to grant extension of time. As the circumstances of the present case do not fall within the exceptions, it must mean that only the Court of Appeal may grant the extension applied for.

and later:

> I now come to the alternative construction of r. 17. The second part of r. 17 expressly provides that where the application is made before the expiration of the time limit for serving the notice of appeal the Court below is allowed to extend time to effect the service. It does not explicitly touch on the question of extending time to file a notice of appeal. Taking a purely literal view it can arguably be said that the rule has nothing to do with an extension of time to file a notice of appeal, which is different from service of the notice. Now taking this argument one step further, it must necessarily mean that in such a case (where the time limit has expired) you will have to make two applications, one to the High Court to extend time to file the notice of appeal and the other to the Court of Appeal to extend time to serve the notice out of time. Such a consequence would indeed be odd and could not have been contemplated by that rule. In my judgment, the only sensible and practical construction to be placed on the second part of this rule is that where the time limit prescribed for filing and serving the notice of appeal has expired, and as prescribed in r. 4 the time limit is the same for both, the application to extend time to do both the acts must be made to the same forum, the Court of Appeal.

Counsel for the husband contended that the Court of Appeal being a creature of statute could not go beyond the strict ambit of s. 29 of the Supreme Court of Judicature Act and that therefore the Court of Appeal had no original jurisdiction. Reliance was placed on *In Re Carroll* [1931] 1 KB 104.

In our opinion, it is not necessary for us to consider the submissions on s. 29 as the proceedings would be an exercise of "original" jurisdiction only because of the use of the term "originating motion". The proceedings are not "original" in any other sense. Litigation between the parties has been going on for more than 5 years, and this application can be considered as an interlocutory motion in the divorce petition. No prejudice will be suffered by the husband if the Court of Appeal treated this as an interlocutory motion.

Turning to the merits of the application, Counsel for the wife relied on *Gatti v. Shoosmith* [1931] 3 All ER 916. In that case, owing to a misreading of the rule, the applicant was a few days too late in entering an appeal. The intention to appeal had been notified to the respondent's solicitors, by letter sent within the time specified by the rule. The applicant asked that the time might be extended on the ground that the failure to enter the appeal within the time limited was due to the mistake of a legal adviser.

Sir Wilfrid Greene MR said at pp. 919 and 920 of the report that:

> On consideration of the whole matter, in my opinion under the rule as it now stands, the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, may be a sufficient cause to justify the Court in exercising its discretion. I say "may be," because it is not to be thought that it will necessarily be exercised in every set of facts. Under the law as it was conceived to be before the amendment, such a mistake was considered to be in no circumstances a sufficient ground. What I venture to think is the proper rule which this Court must follow is: that there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter shall be so treated must depend upon the facts of each individual case. There must be facts in a case which would make it unjust to allow the appellant to succeed upon that argument.
>
> The discretion of the Court being, as I conceive it, a perfectly free one, the only question is whether, upon the facts of this particular case, that discretion should be exercised. If ever there was a case in which it should be exercised, I should have thought it was this one. We are not, I think, concerned here with any question at all as to the merits of this case or the

probability of success otherwise. The reason for the appellant's failure to institute his appeal in due time, was a mere misunderstanding, deposed to on affidavit by the managing clerk of the appellant's solicitors - a misunderstanding which, to anyone who was reading the rule without having the authorities in mind, might very well have arisen. The period involved is a very short one, it is only a matter of a few days, and the appellant's solicitors, within time, informed the respondent's solicitors by letter of their client's intention to appeal. That was done within the strict time, and the fact that the notice of appeal was not served within the strict time, was due entirely to this misunderstanding. On the facts of this case, it appears to me that the case is one where the discretion of the Court ought to be exercised, and, accordingly, leave will be given.

Reliance was also placed on *Palata Investments Ltd. & Ors. v. Burt & Sinfield Ltd. & Ors.*[1985] 2 All ER 517. The headnotes indicate that when considering an application under O. 59 r. 14(12) for an extension of time for appealing beyond the time limit specified in O. 59 r. 4(1) of four weeks from the date on which the judgment or order of the Court below was signed, entered or otherwise perfected, the discretion of the Court of Appeal is unfettered and will be exercised flexibly and with regard to the facts of the particular case. Where the delay is very short and there is an acceptable excuse for it, the Court will not as a general rule deprive the appellant of his right of appeal, and in such a case it will not be necessary for the Court to consider the merits of the appeal.

In that case, Ackner LJ said on p. 521 that:

What I have recited reveals this. The new procedure, which was designed to avoid an extravagant use of judicial time, has obviously failed in this case. The Registrar took close on two hours to hear the case and delivered later a judgment which covered some nine pages of transcript. Neill LJ took over an hour, during which time his attention had to be drawn to the transcript of the expert evidence. He delivered a judgment which took some six pages of transcript. Before us the matter was estimated to last two hours, as indeed it would have done but for the fact that at the outset, having drawn attention to the procedure which used to exist, we expressed the opinion that, in cases where the delay was very short and there was an acceptable excuse of the delay, as a general rule the appellant should not be deprived of his right of appeal and so no question of the merits of the appeal will arise. We wish to emphasise that the discretion which fell to be exercised is unfettered, and should be exercised flexibly with regard to the facts of the particular case. No doubt in some cases it may be material to have regard to the merits of the appeal, because it may be wrong, and indeed may be an unkindness to the appellant himself, to extend his time for appealing after he has allowed the time to elapse, to enable him to pursue a hopeless appeal. But this is not such a case. It took some four days to be tried by Leggatt J and, though no doubt the notice of appeal, when carefully looked at, might be considered in certain respects not to make altogether valid points, there was an issue on causation which satisfied both the Registrar and Neill J an issue which gave rise to an arguable case.

The whole of this matter, it seems to me, depends on whether or not we can properly look on the delay in this case as being an exceptional one. In my judgment I would so classify it. I have already referred to the shortness of the period involved: three days. I have already referred to the fact that the plaintiffs' solicitors knew that there was in all likelihood to be an appeal, so that there was no question of their proceeding on the false assumption that they had achieved finality for their client. I have referred to the fact that the solicitors asked specifically of Counsel for a statement of the length of time for serving the notice and that he gave them a clear statement that it was six weeks. There is the additional point that, not content with that, they checked and it was only the mischance that the new edition of The Supreme Court Practice arrived a few weeks later that stopped them appreciating the Counsel was in error. There is no question of any prejudice arising to the plaintiffs in the circumstances which I have described, and in that situation there was in my judgment absolutely no need to

> go into the complex and time consuming question whether or not there was a good arguable case on the appeal. There is no invariable rule which requires that consideration and it would obviously involve the very reverse to what the new procedure is designed to achieve if on every application to extend time for leave to appeal there was a pre-appeal hearing in order to consider what were the prospects of success.

Counsel for the wife emphasised to us that the question of whether the appeal itself was arguable should not be considered.

Counsel for the husband relied on the case of *Hau Khee Wee & Anor. v. Chua Kian Tong & Anor.* [1987] 2 MLJ 146 for the factors to be considered. In that case it was held by Chan Sek Keong J, in granting the application, that the factors to be taken into account in deciding whether to grant an extension of time to file a notice of appeal are (a) the length of the delay; (b) the reasons for the delay; (c) the chances of the appeal succeeding if time for appealing is extended; and (d) the degree of prejudice to the would be respondent if the application is granted. Counsel also relied on *Banque Nationale De Paris v. Shin Hong Hang Enterprise Pte. Ltd. & Ors.* [1988] 2 MLJ 519; and on *Tan Chai Heng v. Yeo Seng Choon* [1981] 1 MLJ 271 in which Choor Singh J said:

> There are numerous reported decision, both here and in England dealing with the point in issue in this case. The cases show that the Court has a discretion after considering all the circumstances of dealing with the point in issue in this case. The cases show that the Court has a discretion after considering all the circumstances of the case. They also show that for an application to extend time to succeed there must be circumstances which warrant the exercise of the Court's discretion in favour of the applicant. There is also a long line of cases which show further that a mistake or oversight on the part of the applicant's solicitor or on the part of the solicitor's clerk is not a sufficient ground for granting an extension of time to file a file a notice of appeal or a memorandum or petition of appeal. There is very strong support for this view in *Ratnam v. Cumarasamy,* where Lord Guest in delivering the judgment of the Privy Council, observed at p. 229:
>
> > The Rules of Court must *prima facie* be obeyed, and in order to justify a Court in extending the time during which some step in procedure requires to be taken, there must be some material upon which the Court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a timetable for the conduct of litigation.
>
> In this case the only material before me was the affidavit of the appellant's solicitor. The ground there stated was that the solicitor's file was mislaid. That, as stated earlier, did not prevent the solicitor from filing a notice of appeal. In my judgment, the facts disclosed gross negligence on the part of the appellant's solicitor and did not merit the exercise of judicial discretion in favour of the applicant. The application was therefore dismissed.

Counsel for the husband therefore submitted that the only error here was that "pleading" was misconstrued even though it was stated clearly that a "notice of appeal" was not a "pleading" in the 1979 and 1991 editions of the White Book.

In our opinion, the extension of time is a question of discretion, and the factors stated by Chan Sek Keong J in *Hau Khee Wee's* case can be used as a framework in exercising it. In particular, the chances of the appeal succeeding should be considered, as it would be a waste of time for all concerned if time is extended when the appeal is utterly hopeless. In examining the four factors, the delay in the present case was 12 days. There was no indication as to whether any prejudice has been caused by the delay. In fact, the proceedings between the parties have been going on for a long time, and included an attempted reconciliation

which failed. In the present case, therefore, the reasons for the delay and the likelihood of success are factors which weigh heavily. The error of the solicitor arose from misconstruing a "notice of appeal" as a "pleading" and thereby omitting the Court vacation in the computation of time. *Gatti v. Shoosmith* can be distinguished because the appellant in that case had advised the respondent by letter within time that an appeal would be entered. Furthermore, the misunderstanding in that case was one which, to anyone reading the rule without having the authorities in mind, might very well have arisen. That is certainly not the case here.

In *Palata's* case, the mistake of the legal adviser arose from the misreading of a complex practice direction and was compounded by Counsel who advised incorrectly. That is abundantly clear from the passage in Ackner LJ's judgment on p. 518:

> Following the judgment the solicitors for the defendants considered the desirability of an appeal and on 2 October 1984 they had a telephone conversation with junior Counsel and asked him to advise on the merits of an appeal. They asked specifically what was the time allowed for an appeal and he advised that it was six weeks from the date of the order being perfected. Nevertheless, the solicitors took the course of checking that advice by looking at the then current edition of *The Supreme Court Practice*. That was the 1982 edition and it stated that the period was six weeks (see p. 928, para. 59/4). This had in fact been reduced to four weeks in 1982 and this was mentioned in a practice direction given by Sir John Donaldson MR at the beginning of the legal year in 1982 (see Practice Note [1982] 3 All ER 376, [1982] 1 WLR 1312). It was a lengthy practice direction in which the Master of the Rolls referred to the new procedure which was being brought into existence, covering such matters as leave to appeal, notice of appeal, the list of appeals, setting down the appeal, respondent's notice, amendment of notice of appeal and respondent's notice, appearance of appeal in the list of forthcoming appeals, directions by the Registrar, the single Judge of the Court of Appeal, internal appeals and referrals, listing of appeals for hearing and "the warned list", the constitution of Courts, oral hearings and written judgments. In dealing which "notice of appeal" the practice direction stated [1982] 3 All ER 376 at 379, [1982] 1 WLR 1312):
>
> > Heretofore the time for serving notice of appeal has varied according to the nature of the appeal. In future there will be a single time limit of four weeks from the date on which the judgment or order of the Court below was signed, entered or otherwise unless this limit is abridged or extended by order of the Court below, the Registrar, the single Judge of the Court of Appeal or the Court of Appeal (see r. 4(1)). The only exception will be social security appeals with a six-week limit. Applications for leave to serve notice of appeal out of time will be heard by the Registrar. In view of the importance of parties knowing whether a judgment is final or is still subject to possible appeal, it will only be in exception cases that such leave will be granted.
>
> It was only during last autumn (that is, after September 1984) that there began to be distributed by the publishers of The Supreme Court Practice some copies of the 1985 edition which set out the new four week period. During the first fortnight copies were distributed only to persons who had given prepublication orders. It was only later, during the following month or so, that copies of the 1985 edition of The Supreme Court Practice were distributed generally. It was in those circumstances that the solicitor acting for the defendants did not have the 1985 edition before him when he consulted his Supreme Court Practice at the beginning of October and it was thus that he achieved confirmation of the inaccurate advice that had been given to him by Counsel.

As for the chances of the appeal succeeding, Counsel for the wife said that the appeal was against the decision of the learned Judicial Commissioner for not including payment of the sum of $160,000 with interest which had been "agreed" by the parties in the deed. This sum of money arose under the aborted deed of reconciliation, which was repudiated by the wife

when she appeared before Chua J in an application to the Court by the husband to approve the deed. She now wanted to rely on that portion of the aborted deed where she was to be paid $160,000 by the husband. In our opinion, she was blowing hot and cold selectively: of first disavowing the deed and now wanting to rely not on the whole deed, but only on that portion which was advantageous to her. The deed was referred to and submitted on before the learned Judicial Commissioner made his order of 26 November 1990. As the matter was brought to his attention, he must have considered it and had good reasons for not ordering maintenance.

In summary, it was clear that the solicitors in the present case made a *bona fide* mistake in the computation of time. But when an application is made to the Court for an extension of time, the application should be on grounds sufficient to persuade the Court to show sympathy to him. No such grounds were shown in the present case and the application was accordingly dismissed with costs.

Also found at [1991] 3 CLJ 2282